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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

vs.

INDIAN HEAD, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Other Authorities:

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Dept. of Justice, Press Release No. 87-417 (Nov. 20, 1987) 5 n.1

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As the Ninth Circuit has accurately seen, the decision of the Second Circuit in this case would expose defendants to liability for treble damages "simply for bringing forward undisputed evidence that a rival's product is actually hazardous." *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 827 F.2d 458, 466 n.6 (9th Cir. 1987). Allied acted on a genuine and scientifically well founded belief that ENMT was indeed hazardous. It is the extraordinary liability imposed in this setting that led to the broad first question on which certiorari was granted. Our significant contention—that, as the Ninth Circuit said, "[t]he *Noerr* doctrine exists precisely to prohibit such a result" (*id.*)—must be retrieved from the heavy rhetoric heaped upon it by Carlon. The important *Noerr* question presented has nothing to do with Allied's specific tactics; those, if they are reached, may raise the question of "sham" or other *Noerr* limitations. But the first, significant question would be no different if Allied had merely joined with other manufacturers in a pamphlet that persuaded the NFPA, correctly or not, to exclude ENMT because it was hazardous. The question would still be whether that concerted action was outside *Noerr*'s doctrine because the NFPA is not a government agency and addressing the NFPA is not "petitioning the government."

The inflamed rhetoric—a "blatant conspiracy" to create a "polluted" code (Resp. Br. 21; *see also* 4-5, 17), the "corruption" of the process (*id.* 25, 28), and similar language—is of a piece with the "conflated" reasoning the Ninth Circuit accurately identified in the opinion of the Second (*see* 827 F.2d at 465), garbling the affirmative meaning of *Noerr* with questions about the "sham" exception. Recalling that danger, we reply in order to the separable contentions touching these separable issues.

1. Combined Interests Associated in a Standard-Setting Agency for Purposes of Supporting and Voting for Standards To Be Adopted as Legislation Are Within *Noerr*

The briefs of Carlon and the *amici* supporting it dwell at length on the fact that the NFPA is not a government agency, and argue from this that the "indirect" seeking of legislation through adoption of the NEC is outside *Noerr*. The *Noerr* doctrine, it is said, applies only to direct "petitioning of government" (*e.g.*, Resp. Br. 20-23, 27-29; S.G. Br. 12-15). This is another instance when concepts like "direct" and "indirect" serve to cloud rather than illumine a legal problem. The proposed limitation of *Noerr* to "direct" "petitioning" misreads that decision and, more importantly, the principles of First Amendment and antitrust law for which it stands. *Noerr* on its facts repels the notion that efforts to achieve legislative results "indirectly" are outside its purview. The activities there held immune against attack under the Sherman Act were far more "indirect," and more distant from the legislature, than the conduct here in question.

Noerr held in terms that the "right of petition" would be impaired by imposing Sherman Act liability upon "mere solicitation of governmental action with respect to the passage and enforcement of laws." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). But the Court also rejected more broadly an attempt to "impute to the Sherman Act a purpose to regulate, not business activity, but

political activity, a purpose which would have no basis whatever in the legislative history of the Act." *Id.* at 137. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Court made clear that the *Noerr* doctrine was based on both "the rights of association and of petition." *Id.* at 510.

The right of association is closely linked to the right of petition and the other provisions of the First Amendment:

> It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights, . . . and therefore are united in the First Article's assurance.

Thomas v. Collins, 323 U.S. 516, 530 (1945) (citation omitted). When these rights are implicated, even indirectly, attempted governmental regulation must be closely examined. This Court has rejected attempts to limit the categories of constitutional protection by subsuming First Amendment activity "under a narrow, literal conception of freedom of speech, petition or assembly." *NAACP v. Button*, 371 U.S. 415, 430 (1963).

In light of First Amendment principles and the actual ruling in *Noerr*, the cramped reading offered by Carlon and its supporters cannot be sustained. The underlying facts of the *Noerr* case leave no doubt that the protections of its doctrine were not intended to be limited strictly to lobbying in the legislative halls or other direct "petitioning," but embrace a far broader range of political activity aimed at ultimately influencing legislation.

The conduct of the railroads deemed protected in *Noerr* consisted of a " 'vicious, corrupt, and fraudulent' " public relations campaign that went far beyond direct, literal petitioning of the government. *Noerr*, 365 U.S. at 129. The broad sweep and somewhat savage character of that conduct, and its aim at targets far removed from the legislature, were detailed

by the lower courts. The court of appeals affirmed the district court's finding that the defendant railroad association and others were in a "large ever-growing conspiracy . . . to injure and/or destroy the long haul trucking industry," and that

> *the main means used to attain such end was primarily a campaign designed to destroy the good will of the truckers and to instigate and foster government restrictions by creating public hostility* to the truckers, bringing this to the attention of the various legislatures, then proposing legislation crippling to the trucking industry and favored by the Railroads, all under the guise of public spirited organizations and with the defendants' interest concealed.

Noerr Motor Freight, Inc. v. Eastern Railroad Presidents Conference, 273 F.2d 218, 220 (3d Cir. 1959) (emphasis added), *rev'd*, 365 U.S. 127 (1961).

That description of the facts concurrently found by the district and circuit courts exposes the error in Carlon's narrowly blinkered conception that the doctrine of *Noerr* applies only to "petitioning the government" directly. If anything, as the quoted findings indicate, the "main means" employed "primarily" in *Noerr* was a campaign addressed to public opinion and to destroying the good will of the truckers' customers and potential customers. Nevertheless, since those forces were marshalled with the purpose of affecting legislation, the historic result excluding Sherman Act liability was established by this Court. Viewed in this factual context, the result in *Noerr* extends well beyond mere "petitioning" to protect a full range of associational activities, ethical or unethical, employed in the political arena.

Moreover, as the court of appeals had made clear, the wide array of means employed by the railroads and their collaborators were themselves intrinsically illegal apart from the Sherman Act—notably the railroad association's deceptive behind-the-scenes campaign used as a means of "concealing their own adroit manipulation." *Id.* at 220 n.2. All of that, in striking contrast with the open conduct here in question—conduct that violated no rules and broke no laws—highlights

the extremely narrow misconception by which respondent and *amici* allied with it measure the meaning of *Noerr*.[1]

2. Allied's Conduct in Lobbying the NFPA Is Correctly Viewed as Political Activity Within the Scope of the *Noerr* Doctrine

As the district judge made clear, this case is about tactics in a voting situation—the massing of favorable voters for a critical, though not a decisive, vote—that have their familiar counterparts throughout the "political arena." That arena includes votes in clubs, corporations, partnerships and other associations as well as in elections for government office. And the goal, plainly and effectively sought by Allied, was legislation adopting the NEC.

We have here, as the NFPA describes it for its members, including Carlon and Allied, a known and fully understood process in which competing "interests have the privilege of designating their representatives and instructing them how to vote" (A. 1990). Carlon makes a self-defeating effort (Resp. Br. 36) to characterize Allied's conduct as deceptive because of the allegedly blind reliance of local governments and industry participants upon the NEC as an objective, non-political code. However, Carlon elsewhere devotes a special point to showing the widespread industry concern over Allied's tactics at the NFPA meeting (*id.* at 9-10)—leaving no doubt that industry participants were well aware of Carlon's objections to what

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1 The Antitrust Division takes a broader view of the *Noerr* doctrine than is reflected in the Solicitor General's brief in this case. In November 1987, the Department of Justice responded to a request for a statement of its antitrust enforcement intentions with respect to the "formation and operation" of a coalition of chemical and railroad companies to engage in joint conduct to evaluate and comment upon issues concerning the transportation of hazardous materials by rail. In announcing that it would not challenge the proposal under the antitrust laws, the Department stated that the coalition's activities, which include but are not limited to commenting on legislative and regulatory proposals, "appear to be protected under the Noerr-Pennington doctrine," so long as they do not violate traditional antitrust concerns regarding discussion of prices or "other competitively sensitive matters." Dept. of Justice, Press Release No. 87-417 (Nov. 20, 1987).

Allied had done at that meeting. The record shows a robust and wide open process of debate, voting, and publicity. The NFPA's description of itself reflects a general understanding to this effect, disclosing a known arrangement that this is a forum where competing interests meet and contend. The NFPA proclaims "the democratic process under which the NEC is developed" (A. 1987), the NEC's function to "protect lives and property" (*id.*), its "consensus procedures representing a balance of interests and opportunity for review and comment at all levels" (A. 1988), and its foundation "on voluntary participation, procedural fairness, and cooperative effort between government and the private sector" (*id.*).

These central facts tend to be obscured in Carlon's rhetoric and citation of cases about price-fixing, boycotts, and other (irrelevant) per se violations of the Sherman Act. The inquiry is not advanced by talk of an "admitted" and "blatant conspiracy" (Resp. Br. 4, 21) when the record references are only to an "admitted" understanding that Allied would marshal members as it did. Similarly unhelpful are references to a "polluted" code (*id.* at 18, 21), "corruption" of the process (*id.* 25, 28), "stuffing the ballot box" (*id.* at 35), and "rigging" (*id.* 5, 17, 18, 19) or "fixing" the vote (*id.* at 27, 34), which distort the nature and context of Allied's conduct as reflected in the record. And insofar as Carlon culls warlike words from the record—"troops" and "bodies" "enlist[ed]" as part of the "battle plan" (*id.* at 27, 34-35)—those defeat Carlon's purpose; words like these echo, and in fact are, the familiar language of politics.[2]

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2 For example, on the eve of the 1984 election, a political analyst commenting on a close congressional race in Mississippi stated: "The whole race is going to come down to get out the vote—who can get their troops out." "Blacks, Hispanics Trying to Hold Own in Congress," Associated Press, Oct. 30, 1984 (available on NEXIS). In 1984, the campaign of Walter Mondale assembled 3,500 precinct captains to "churn out participants" for the Iowa caucuses. "Mondale Troops Get Out the Vote," United Press International, Feb. 19, 1984 (available on NEXIS). And a report on current caucuses noted that Republican presidential candidate Pat Robertson had achieved success at state party conferences through his ability "to pack meetings." "Robertson Registers Two Victories at G.O.P. Gathering in Virginia," N.Y. Times, Dec. 7, 1987, at A29, col. 1 (available on NEXIS).

The actual *actions* of Allied in fact closely resemble tactics familiar in the political process, whether in contests for public office, for corporate control, or for other kinds of organizational power. What Allied did, obeying lawful rules, was simply to "get out the vote" in an interim election. Political analogies come quickly to mind.

As this case is being briefed, almost a score of candidates and their workers are scouring Iowa, New Hampshire and much of the South to "get out the vote." No one will ask any voter's rationale or knowledge of the issues. But the votes will count. At the same time, these interim votes will not be decisive. The process continues to decisions at national conventions. Similarly, the May 1980 NFPA membership vote, the entire basis of Carlon's claim, was unquestionably important, but not decisive. The rules allowed Allied to get out the vote exactly as it did. As the jury found, that vote did not "effectively determine whether Article 331 would be excluded from the NEC" (Question No. 6, J.A. 24). On the contrary, as the next finding shows, the procedural regulations were "fair in that they provided a full and effective appeal from the vote of the membership" (Question No. 7, J.A. 24). As the jury also found, Allied's actions did not "deprive Carlon of full and effective access to the NFPA" (Question No. 8, J.A. 24).

In sum, Allied's political conduct is not meaningfully distinguished from the protected political conduct in *Noerr*. Ethically it was surely on a higher plane. And it bears no likeness to a classic antitrust violation. Carlon nevertheless cites a number of antitrust cases standing for the undisputed proposition that horizontal combinations that act to restrain trade through group boycotts or price-fixing are illegal. None of these cases addresses the *Noerr* doctrine, and none of them concerns conduct the primary goal of which is to influence legislation.[3]

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3 New York's and other States' Attorneys General as *amici* support Carlon with similar string citations to inapposite cases concerning traditional antitrust conduct such as price-fixing, agreements to limit product lines, and boycotts (N.Y. Br. 16). In the same vein, the Solicitor General argues that price-fixing and group boycotts, even if aimed at influencing legislation, are prohibited under the Sherman Act (S.G. Br. 18-19). Even if the proposition were unqualifiedly true, *but see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), it is not germane.

For example, in *Fashion Originators' Guild of America Inc. v. Federal Trade Commission*, 312 U.S. 457 (1941), textile and garment manufacturers organized a group boycott aimed at deterring design piracy. There was no suggestion that a "conspiracy" to affect *legislation* governing design piracy would have been an antitrust violation. Under *Noerr*, if there had been such a campaign—one aimed at legislation—rather than a group boycott, that campaign would have been protected even if it included public relations and advertising activities aimed at destroying the business of competitors, and even if it included false or misleading material.[4]

Allied's actions in connection with the 1981 NFPA had no resemblance to a boycott, price-fixing or any similar per se offense. The subject was the enlistment of voters and the successful managing of a vote, all in the process of achieving the exclusion of ENMT from the NEC and thus, as a sure consequence, from legislative codes all across the country.[5] The effort was plainly and simply "political" within the principles of *Noerr*, as every court but the Second Circuit has seen in dealing with the NFPA or like processes.

4 Carlon also relies upon *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), where this Court affirmed a Sherman Act judgment against a trade association based on the manipulation of an industry code by the chairman of a subcommittee of the code-making organization. That individual had acted as he did in order to benefit his own firm, a competitor of the firm whose product he refused to certify. Carlon argues in vain (Resp. Br. 24) that this case of purely private, manipulative, and anticompetitive conduct—analogous to having a judge on the payroll of a litigant, and in no way reflecting any effort to affect legislation—somehow controls the present case. Not surprisingly, the *Noerr* doctrine was never even raised in the *Hydrolevel* case.

5 This central aspect also renders irrelevant *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), a case heavily relied upon by the Solicitor General (S.G. Br. 13-14). In that case, the Court held *Noerr* to be inapplicable because "[r]espondents were engaged in private commercial activity, no element of which involved seeking to procure the passage or enforcement of laws." 370 U.S. at 707.

3. The Principles of *Noerr* Are Not Rendered Inapplicable Because of the "Private" Character of the NFPA

a. *Labels are not the answer*

The briefs for respondent and *amici* supporting it argue at great length that the NFPA is private, not a governmental agency (Resp. Br. 26-27, S.G. Br. 12-15, N.Y. Br. 7-10). Those extended statements of the question shed little or no light on the answer. As the Ninth Circuit observed in *Sessions Tank Liners, Inc. v. Joor Manufacturing, Inc.*, 827 F.2d 458, 462 (9th Cir. 1987), "[t]he labels 'governmental' and 'private' are . . . of limited utility." What is far more to the point, in the pertinent reasoning of the *Sessions* court (*id.*), is that Allied's "efforts were directed at a private association serving as a conduit to local legislatures." Here, as in that case, substituting the NFPA for the organization involved in *Sessions* and Allied for Joor, Allied's

> efforts, albeit directed at an ostensibly private body, were without doubt part of a plan ultimately to procure favorable legislation. . . . The [NFPA], whether designated as "public," "private," or even "quasi-governmental," plays an important and generally accepted role in the legislative process. . . . The [NFPA's] substantial power and the [NEC's] impact on local . . . laws cannot be denied. For this reason the First Amendment right of petition affords protection to those seeking to influence the [NFPA's] decisions.
>
> . . . Rights of association are also implicated . . . . [Allied] was undoubtedly exercising its associational rights when it participated in a private organization to advance its legislative causes, whatever they may have been.

Id. at 463 (citations omitted). Here, as in *Sessions*, *id.* at 468 (citing *California Transport*, 404 U.S. at 513), "the [NFPA] was an indispensable part of the 'political arena.' "

Seen in this light, focusing on political realities rather than labels, Carlon's argument that the NFPA is not a " 'quasi-legislative body' " (Resp. Br. 21 n.32) is at best a straw man.

The broad public that the railroads sought to influence in *Noerr*—with the hope that this influence would be transmitted indirectly to the legislature—was more clearly not a "quasi-legislative body." The NFPA is a more sharply defined, uniquely directed agency to draft and codify provisions that become legislative enactments. It makes sense as a practical matter to speak of "lobbying" the NFPA, but not of "lobbying" the general public. But whatever language is employed, Carlon's formulation ignores that *Noerr* itself was predicated on completely "indirect" pressure. Allied, even more than the railroad association in *Noerr*, intended to influence the political process.

The suggestion of Carlon (Resp. Br. 28) and the Solicitor General (S.G. Br. 9, 12, 16-17 & n.15) that *Noerr* protection for Allied's conduct somehow fails because of the NFPA's tax-exempt status is a pointless detour.[6] Neither brief negotiates the leap from the obvious factual statement that the NFPA does not directly engage in "petitioning" government to the conclusion that Allied's conduct does not constitute a *Noerr*-protected attempt to influence legislation. It is undisputed that the NFPA promulgates the NEC, and that states and local governments widely adopt the code as their own; it is the "most widely disseminated and adopted model code in the world" (Pet. App. 4a-5a & n.1). As the Second Circuit recognized, this process is virtually automatic in a majority of states (*id.*).[7] The sure, effective, and predictable consequence of Allied's successful political activity within the NFPA was to have its message communicated directly to the state legislatures

6 The Solicitor General places special emphasis on this argument that because the NFPA is exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code and is therefore prohibited from devoting a "substantial part" of its activities to efforts to influence legislation, the NFPA's activities cannot be seen as "petitioning" (S.G. Br. 9, 12, 16-17 & n.15).

7 The Solicitor General mistakes the record when he says (S.G. Br. 17) that Allied's activity within the NFPA was undertaken with "the mere hope or expectation that some government bodies will take notice." The "expectation" in this case was far from "mere;" as a matter of undisputed fact, what the NFPA decides about an issue will assuredly be adopted into law in a majority of jurisdictions, with little or no change.

and, almost routinely, enacted into law. As the Ninth Circuit said of the WFCA in *Sessions*, 827 F.2d at 462, the NFPA is a direct "conduit" to the legislature. Affecting the NFPA was a far more precise and targeted route to legislation than the campaign in *Noerr* to influence general public opinion.

Thus, neither the Internal Revenue Code nor the imaginary question of "petitioning" *by* the NFPA has anything to do with this case. The NFPA's admittedly proper activities of promulgating the code, making it publicly available, and communicating it directly to the several legislatures are the certain and sufficient steps that result in the NEC's wholesale inclusion in the electrical codes of most states and localities.[8]

The indirect "petitioning" protected in *Noerr* had far less likelihood of success than Allied's activities here. If the mere hope of influencing the legislature through the general public may constitute protected indirect petitioning, then *a fortiori* the virtual certainty of influencing the legislature must be considered protected *Noerr* activity.

b. *The far less effective, more costly and more speculative alternative of lobbying hundreds of jurisdictions does not render* Noerr *inapplicable*

In the face of the undisputed record of outright reliance upon the NFPA's product by most state and local governments, Carlon suggests (Resp. Br. 28) that Allied had "ample opportunity to lobby at the legislative level." To support this argument, Carlon quotes language from the Second Circuit's opinion that includes fragments of the district court's decision. Read in context, however, the district court's holding, which takes account of the political realities, is clearly the opposite of Carlon's argument (Pet. App. 25a-26a, emphasis added):

> So we are dealing here with a body which, as plaintiff concedes and defendant concedes, and have conceded

8 It does not diminish but enhances the case for applying *Noerr* to say, as the court of appeals did, that NFPA's "alleged 'quasi-legislative' status results solely from the *de facto* 'delegation' of law-making authority evinced by the extent of the reliance of the various governments upon the NEC" (Pet. App. 13a n.4). The reality of this quasi-legislative status is at the heart of the case.

> throughout this litigation, once they adopt the safety standard, that standard will almost inescapably be followed by the legislatures of the various states. While there is obviously an opportunity to change the mind of the legislature and while obviously there is an opportunity for the defendant and the plaintiff to lobby at that level, both sides seem to agree and have agreed from the inception of this litigation that *the decision of the NFPA will be largely determinative of what the legislatures do*.

Other courts addressing this question have also concluded that *Noerr* applies where approval by a code-making body is tantamount to approval by many government entities. *See, e.g., Sessions*, 827 F.2d at 462-63; *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833, 839-40 (N.D. Ill. 1983); *Rush-Hampton Industries, Inc. v. Home Ventilating Inst.*, 419 F. Supp. 19, 22-23 (M.D. Fla. 1976). Therefore, to the extent that the availability or unavailability of alternative means of pursuing First Amendment activity might be thought a relevant consideration, this factor cuts in Allied's favor. Meaningful access to the code-making process *must* begin at the NFPA, because that is where it largely ends.

But the entire issue of direct petitioning is a diversion in any event, since the possibility of lobbying the legislature directly was certainly available to the railroads in *Noerr* as well. Protection for the railroads' indirect lobbying was in no way conditioned upon their inability to lobby directly. Nobody doubted that the railroads engaged in direct lobbying as well as the concerted campaign away from the legislature that led to the suit against them in *Noerr*. That made no difference there. It should make none here.

4. Code-Making Activity, Itself Efficiency Enhancing and Procompetitive, Would Be Deterred If Sherman Act Liability Were Imposed on Allied in this Case

Carlon acknowledges the importance of the code-making activity of the NFPA: "so many people, including a number of governmental organs, rely on the standard making activities of associations such as the NFPA, and . . . such associations

render valuable civic services" (Resp. Br. 33). But Carlon does not explain how the "valuable civic services" can continue if the adoption of a scientifically valid code can subject participants in the organization to treble damages. If Carlon is correct that Allied's campaign to exclude ENMT from the NEC was unlawful, any industry participation in code-making activity will be at the risk of Sherman Act liability. Such an outcome would deter participation in code-making, injure consumer interests, and impair competition in the marketplace.

a. *Code-making activity promotes values the Sherman Act is designed to protect*

As this Court has often noted, information is an essential requirement in the marketplace:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976).

In gathering, investigating, digesting, and disseminating information about building materials, the NFPA performs a vital task less expensively and more efficiently than individual consumers could.[9] By winnowing out unsafe products or requiring safeguards for their use, certification and standards programs also help reduce the societal costs of such products and serve the goal of efficient resource allocation (Tr. 1556-57).

The drastic impact of the ruling below upon consumer interests and choices is apparent in the stark language of the court of appeals. As the record showed and the jury found (Question No. 1, J.A. 23), Allied acted upon "a genuine belief

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9 Howe and Badger, *The Antitrust Challenge to Non-Profit Certification Organizations: Conflicts of Interest and a Practical Rule of Reason Approach to Certification Programs as Industry-Wide Builders of Competition and Efficiency*, 60 Wash. U.L.Q. 357, 378 (1982).

as of May 1980 that electrical nonmetallic tubing ('ENMT') was unsafe." But that factor, vital to the safety interests of consumers, is set at naught in the decision below, with the brief observation that (Pet. App. 22a) "[t]he 'objective validity' of a restraint has never been a defense to an antitrust charge." That statement, with the inapposite citation to *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927), a price-fixing case, plainly begs the question. As the Ninth Circuit said (*Sessions*, 827 F.2d at 466 n.6):

> Thus *Indian Head* in effect suggests that defendants may owe treble damages simply for bringing forward undisputed evidence that a rival's product is actually hazardous. The *Noerr* doctrine exists precisely to prohibit such a result.

Totally overlooking the procompetitive, information-gathering and purveying functions of the NFPA, and dismissing the entire process as a Sherman Act "restraint," the decision below misconceives and disserves the pertinent antitrust principles as well as the relevant concerns under the First Amendment. It effectively turns the Sherman Act into a weapon to be used against the very values the Act is meant to protect.

b. *Denying* Noerr *protection to Allied's indirect lobbying would deter full participation in the code-making process*

Carlon and *amici* fail to rebut Allied's argument that the imposition of treble damage liability for Allied's indirect petitioning would have a severe chilling effect on these valuable code-making processes (*see* Pet. Br. 27-30). Each brief offers abstract words of comfort on this issue without any analysis or practical insight. Nobody suggests that agencies like the NFPA have broad or total immunity under the Sherman Act. The question is only as to the *Noerr* protection.[10] The briefs supporting Carlon give no useful answer.

10 Carlon suggests (Resp. Br. 36) that recognition of *Noerr*'s application to Allied's conduct would "remove the Sherman Act's protection from

Previous Sherman Act claims involving code-making organizations have involved fraud, untruths, or clear antitrust misconduct unrelated to influencing legislative action, directly or indirectly. By contrast, a refusal to apply the *Noerr* doctrine to Allied's conduct would expose all code-making participants to treble damage liability whenever they vigorously and truthfully advocate a position within a code-making organization through traditional political means.

The claim that no legitimate activity will be deterred is palpably wrong. There can be no comfort in a standard protecting only trade association debate not "tainted" by "collusion" or exclusion of competition. Virtually all standard-making and code-making activity involves a combination of competitors—which can be viewed as "collusion"—and to the extent unsafe products are not approved, every code involves exclusion of a competitor. If that is the test, no industry-wide code-making can occur without the risk of antitrust claims, litigation, and uncertain jury results. The potential that even a *bona fide*, safety-related objection, pressed vigorously but within the rules and without impairing an opponent's access, can lead to antitrust liability or even years of litigation to prove one's innocence belies the notion that code-making will not be deterred and debate chilled.

5. Neither "Sham" Nor Any Other Valid Limitation Can Sustain the Decision Below

It may be arguable that in treating the political process within a nongovernmental standard-setting organization, the *Noerr* doctrine would not extend (as it did in *Noerr*, *see* 365

all aspects of the standard making process whenever the resulting standards are ultimately adopted by some organ of government." But applying the *Noerr* doctrine here obviously would not immunize *all* activity within *all* standard-setting organizations, but would only give elbow room for political activities within such groups where the activities are genuinely motivated by a desire to influence legislation and where the organization operates under fair rules and participants have full and effective access to the decision-making process. It is actually Carlon that proposes an extreme result: a sweeping *exclusion* of all standard-making activities from the *Noerr* doctrine.

U.S. at 140) to concerted actions constituting fraud or deception, illegal in themselves apart from the antitrust laws.[11] The Court may also conclude in a proper case that for conduct relating to such an organization, there must be procedural safeguards to ensure that competitors are not deprived of fair access to the means for affecting legislative or other governmental action. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972); *Silver v. New York Stock Exchange*, 373 U.S. 341, 358-359 (1963). There is undoubtedly room, "under the aegis of the rule of reason," *Silver*, 373 U.S. at 360, for limitations that would preserve the values of free lobbying and political pressures within standard-setting organizations while avoiding expansions of the Sherman Act to embrace unintended cases like this one. The limitations the Court may come to fashion could evolve under "the 'sham' exception in the *Noerr* case, as adapted," *California Transport*, 404 U.S. at 516, or under some different formulation appropriate to new problems as they arise. But there are no grounds for exceptions or exclusions from *Noerr* in this case.

Under the decision of the Second Circuit, the principles of *Noerr*, and the valuable goals served by standard-setting agencies like the NFPA, are sacrificed to a stultifying line drawn against "indirect" means of seeking legislation. In pursuit of its legislative goals, Allied violated no laws. It broke no rules. Carlon, as the jury found, had a "full and effective appeal from the vote of the membership" and "full and effective access to the NFPA" (Questions 7 and 8, J.A. 24). The open-ended standard of "subversion," importing an unacceptably vague commission for judges or juries to apply variant notions of ethics or etiquette, is hardly a sound guide to defining the limits on essentially political conduct. There are, in short, no valid reasons of doctrine or wise antitrust policy for denying the applicability of *Noerr*, and applying the inapposite strictures of the Sherman Act, to Allied's vote-getting actions within the NFPA to achieve the legislative exclusion of ENMT from state and municipal codes.

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11 And it should go without saying that there is no protection under *Noerr* for crimes like "kidnapping a legislator", which is among the subjects addressed in the Solicitor General's amicus brief (S.G. Br. 18-19).

Nor does Allied's conduct come within the sham exception, a question not reached by the court of appeals.[12] Carlon does not dispute the proposition that in cases involving legislative petitioning, the sham exception will virtually never apply. *See, e.g.*, P. Areeda & D. Turner, *Antitrust Law*, ¶ 203.1c, at 11 (Supp. 1986); Handler & DeSevo, *The Noerr Doctrine and Its Sham Exception*, 6 Cardozo L. Rev. 1, 18 (1984). Instead, Carlon cites to cases involving the administrative and adjudicative context, where the exception has broader play. *See, e.g.*, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972); *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785, 809-12 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984). In *California Transport*, this Court expressly distinguished the legislative setting, in which even unethical lobbying conduct is protected by *Noerr*, from the adjudicatory process, where "unethical conduct . . . often results in sanctions." 404 U.S. at 512. The Court added: "Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *Id.* at 513.

Carlon cites to no case in which legislative petitioning was held a sham despite a genuine intent to influence the legislature. Lacking such authority, Carlon offers no basis for overturning the district court's clearly correct ruling that Allied's conduct did not constitute a sham but was a genuine attempt to influence the legislative process (Pet. App. 26a).[13]

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12 The "sham" contention, neither decided by the court of appeals nor put before the jury in the district court (*see* A. 95), may be deemed by the Court unsuitable for decision here in the first instance.

13 Even if the sham doctrine were to be given broader scope in the legislative context when industry code-making is at issue, as was perhaps suggested by the Ninth Circuit in *Sessions*, 827 F.2d at 468, it ought not to reach Allied's conduct here. Having established to the jury's satisfaction that it believed Carlon's product to be unsafe, a belief supported by substantial scientific evidence, that it acted on that belief in opposing ENMT, that it followed the NFPA's rules, and that it did not deny Carlon full and effective access to the NFPA, Allied satisfied any realistic test that might be applied to measure "sham" pursuit of legislation.

6. Carlon Did Not Prove Any Independent Marketplace Injury, an Essential Predicate of Its Effort to Escape from *Noerr* and *Parker v. Brown*

Carlon labels as "remarkable" (Resp. Br. 14) our argument that *Noerr* and *Parker v. Brown*, 317 U.S. 341 (1943), read together, require reversal, because Carlon's injury, if any, flowed from legislative enactment of the NFPA. Carlon counters that Allied's conduct caused marketplace injury independent of the legislative enactment of the NEC and protests that its present theory is not "an afterthought introduced for the first time at the damages stage of the trial" (Resp. Br. 30, n.39). The record shows otherwise. Marketplace "stigma" was never Carlon's theory of liability at trial. Further, any incidental evidence of such harm was insignificant, unrelated to the liability issue, and wholly unsupportive of the trebled $3.8 million verdict.

There has been no answer to the demonstration in our main brief (*see* Pet. Br. 7-8, 39) that, from complaint through summation, Carlon was steadfast in asserting that the injury it sued for flowed from legislative enactment of the NEC. Carlon's claim, at the time of the post-trial *Noerr* motion, that it had pursued a different injury theory came as a surprise not only to Allied but also to the district judge:

> THE COURT: I think your theory of damages all along was that your damages flowed from the fact that you were not approved and therefore not adopted by the state legislatures involved.
>
> MR. YERMAN: We had discussions about that.
>
> THE COURT: That was your theory of damages all along. When did you change it? (J.A. 66).

Not only is the attempt to switch theories a departure from the case the district judge "remember[ed] trying" (*id.*),[14] it is

14 Carlon twice cites a portion of the district court's instruction on damages, which, it asserts, proves that the damages Carlon was awarded "flowed from" some independent market injury (Resp. Br. 13 n.26, 30-31). But Carlon cites this fragment out of context. At the time the damage charge was given to the jury, the court had not yet decided whether *Noerr* protected Allied's activities in the NFPA because they influenced legislation. The court had, however, concluded that *Noerr* protected Allied's *direct* lobbying of state legislatures and its publicity campaign designed to influence legislators. The purpose of this portion of the damage charge—as the district judge later explained (J.A. 68)—was to exclude from the jury's calculation of damages evidence that Allied had made presentations directly to legislatures (Tr. 2732-33, 2734-35) and produced booklets for distribution to the public urging contact with legislators (Tr. 2994, 2998).

also in bald contradiction of the jury's answers to the questions on liability. Those answers focused squarely and exclusively on Allied's actions to defeat Article 331 in the May 1980 meeting, and not at all on any notion about "marketing the stigma." Allied's conduct was found to be "a substantial or material factor in excluding Article 331 from the 1981 NEC" (Question No. 9, J.A. 24). It was the "opposition at the May 1980 NFPA meeting" that the jury found to be other than "the least restrictive means" of opposing "use of ENMT in the marketplace" (Question No. 10, J.A. 25). It was "Allied's conduct in opposing Article 331" that was found to "adversely impact competition" (Question No. 11, J.A. 25). The court of appeals was led to a patent error when it moved from these findings to embrace Carlon's baseless claim that liability could be sustained, despite *Parker*, because Allied "marketed the stigma."

Carlon's attempt to rewrite its liability case and show that it suffered independent market harm is a failure. Carlon points to a stipulated fact, misleadingly presented here, and a couple of other record references in its liability case asserted to show that there may have been such independent market harm, namely: the stipulated fact that Underwriters Laboratories ("U.L.") "normally" will not list or label a product without NEC approval; evidence that many inspectors, contractors and distributors will not use a product not listed or labeled by U.L. or the NEC; and evidence that many underwriters will not insure a structure using such an uncertified product (Resp. Br. 11, 29-30, 30 n.40).

Carlon neglects to mention, however, its own evidence that whatever the stipulated "normal" procedure, Carlon succeeded in obtaining an interim U.L. label for ENMT in 1981, the first year the NEC at issue was in effect (PX 342 at p. 4). The existence of that U.L. certification removes the only apparent basis for Carlon's argument that it proved independent marketplace injury.[15]

In sum, the record leaves unsupported Carlon's claim that it tried and proved a case based upon independent market injury. There is no escape from the combined impact upon this case of *Noerr* and *Parker*. The decision below is at war with both.

CONCLUSION

The judgment of the court of appeals should be reversed.

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15 Carlon's evidence in the damages phase of the trial was no less trivial for present purposes. In fact, the evidence showed that in some places where the code was "in effect," Carlon obtained a "variance" (Tr. 2593, 2822). Accor ng to Carlon's witness, "that is the same in that market as being in the National Electric Code" (Tr. 2590).